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# No. 80-689

# In the Supreme Court of the United States

**October Term, 1980**

GARY E. WIDMAR, et al.,
*Petitioners,*

vs.

CLARK VINCENT, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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### REFERENCES TO THE RECORD

References to the record in this brief will be by citation to the items included in the Appendix to the Petition for Certiorari. The term "Appendix" used herein shall mean the Appendix to the Petition for Certiorari.

### INTRODUCTION

In this case, the United States Court of Appeals held that adult, private individuals could not be discriminatorily prohibited from associating in a public forum for the purpose of engaging in voluntary religious speech and religious activity where other groups are permitted to meet and pursue their special interests without restriction and without censorship.

The University, in urging this Court to grant certiorari, states that this case is of great importance because it will affect "every public college and university . . . in the United States." (Petition for Certiorari, page 8). Student-Respondents respectfully disagree. The colleges and universities affected by this decision are only those which have not *already* permitted voluntary student religious activity on campus.[1]

The University also implicitly seeks to cause the Court to feel that religious activities on campus will be disruptive to the academic climate. The University seems to forget that from 1972 or 1973 until January, 1977, the University ("UMKC") allowed Cornerstone and other religious groups to meet on campus without censorship or restriction of their activities (Appendix at A-32, 33) because the University did not have "full knowledge" of the religious nature of the activities (Appendix at A-31, para. 9). There is no indication in the record that during those years the campus was caused to undergo any trauma or tumult, or interference with academic life, as a result of such religious activity. Nor does the record indicate that the rights of anyone, taxpayer or otherwise,

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1. Although there is not a great deal of available data showing just how many colleges and universities permit religious teaching and religious worship on campus, there is data available suggesting that a substantial percentage of institutions do. In 1973, Dr. George W. Jones, Director of Religious Programs and Professor of Higher Education at Ball State University published the results of a study he conducted showing the broad range of different approaches to religious accommodation employed by colleges and universities nationally. Some of the approaches, on one hand, included an official "religious emphasis week" and a university - employed Coordinator of Religious Activities. On the other hand, some universities went so far as to refuse official recognition, and the privileges attendant thereto, to student religious groups. *The Public University and Religious Practice: An Inquiry Into University Provision for Campus Religious Life,* Jones (Ball State University, 1973). This monograph, which will be gladly furnished to the Court upon request, also contains an excellent bibliography of related articles.

were violated simply because students interested in religious activities met on campus for prayer, Bible study, and similar pursuits.

The University fails to set forth any valid reason why certiorari should be granted in this case. The opinion of the Court of Appeals is in accordance with settled constitutional law and provides clear direction and guidance to those universities which must now implement changes in their regulations. The decision does not in any sense erode away the legitimate, intended reach of the Establishment Clause because the decision does not endorse official sponsorship or promotion of religious activities, but simply mandates a neutral and reasonable accommodation of religious exercise by private individuals. The decision recognizes that the Establishment Clause was never intended to be used as a bludgeon against the free exercise of religion,[2] and the decision shows the strong commitment to the protection of individual liberties which has characterized the decisions of this Court.

This case has nothing to do with state-sponsored prayer or governmentally-orchestrated religious indoctri-

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2. In *Engel v. Vitale*, 370 U.S. 421 (1962), Mr. Justice Black, author of the majority opinion, noted that there were two purposes behind the Establishment Clause. One reflects a recognition of the fact that a union of government and religion tends to destroy government and to degrade religion. The second purpose arose out of the awareness of the drafters that "governmentally established religions and religious persecution go hand in hand" *Id.* at 432. Both provisions, therefore, were ultimately designed *to protect freedom of religion.*

> "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618 (1978) at 642 (Brennan and Marshall, JJ., concurring).

nation. Nor does the case involve an effort by the Student-Respondents to obtain any more accommodation or favoritism for their meetings or their purposes than that which is afforded other special interest groups on campus. Nor does the case involve any disruption or interference with the academic purposes and atmosphere of the University. Nor does the case involve a religious group applying for a financial grant or financial assistance of any sort. It merely involves the right of these religiously motivated students to use the buildings and grounds of the University, like other special interest groups, and without favoritism or pre-emption of space from other groups, to pursue their own special interest.

## ARGUMENT

### I. The Decision of the Court of Appeals in This Case Is Not in Conflict With Any Decisions of This Court.

The opinion of the Court of Appeals shows careful reliance upon the law and doctrines of past decisions of the United States Supreme Court, and there are no decisions in conflict with the Eighth Circuit ruling in this case. In fact, this Court was once previously asked to grant certiorari in a case of essentially identical facts, and this Court declined to do so, leaving intact the decision of the Supreme Court of Delaware which upheld the right of university students to engage in religious exercise on campus. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976). In that case, the University of Delaware had attempted to enjoin Roman Catholic students from conducting a mass in the commons area of a dormitory on campus, relying on establishment argu-

ments.[3] The Court of Chancery found that the rights of the students were not "substantially" infringed by a denial of permission, and granted the injunction. 318 A.2d 135, at 142. The Supreme Court of Delaware, however, reversed the decision of the lower court, holding that the students' first amendment rights were unconstitutionally burdened by such a restriction, even though Catholic churches were available off campus in nearby locations.

Furthermore, the Court of Appeals decision in this case is distinctly in harmony with principles established and clarified in previous Supreme Court decisions. For instance, this Court enunciated the doctrine that equal access to a public forum must be granted on an equal basis to all who would peaceably use it without regard to the content of the proposed expression. *Police Department v. Mosley*, 408 U.S. 92 (1972) (an area had been opened by the city to labor picketing, but not to picketing or expression with regard to other matters). This Court has also vindicated the right of university students to be recognized and to use university facilities in pursuit of their special interests, without regard to the university's approval of their purposes. *Healy v. James*, 408 U.S. 169 (1972) (Students for a Democratic Society could not be refused recognition and the right to meet on campus).

The three-pronged Establishment Clause analysis employed by the Court of Appeals was originally promul-

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3. Petitioners contend that "there were apparently no prohibitions contained in the Constitution of the State of Delaware" (footnote 1, page 9, of their Petition). But Petitioners fail to note the fact the University of Delaware Charter (14 Del. C. Section 5103) provided that the "University shall never be managed or conducted in the interest of any party, sect or denomination." *University of Delaware v. Keegan*, 318 A.2d 135 (Del. Chancery, 1974).

gated by this Court,[4] and has been employed by this Court on many occasions.[5]

The decisions of this Court have also accorded great protection to individual rights of religious freedom as well as freedom of speech.[6] Included in the decisions of this Court have been those clearly mandating the accommodation of religious speech and exercise on public property. *Tucker v. Texas*, 326 U.S. 517 (1946) (minister could not be prosecuted for refusal to cease distribution of religious literature in a town owned by the federal government); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (minister could not be prosecuted for holding religious meetings in public park without a permit); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Jehovah's Witnesses could not be denied the right to hold "Bible talks" in a public park. *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (blanket refusal to license religious services in public park violated first amendment). "Government may not interfere with efforts

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4. *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

5. *E.g., Tilton v. Richardson*, 403 U.S. 672, reh. denied, 404 U.S. 874 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Committee for Public Education v. Regan*, ..... U.S. ....., 63 L.Ed.2d 94 (1980).

6. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents could not be denied the right to send their children to church-operated schools); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unlawful to deny unemployment benefits to Sabbatarian who could not secure employment due to her conscientious refusal to work on Saturday); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents could not be forced to comply with requirements of compulsory formal education after the eighth grade where such requirement presented serious conflict with the free exercise of their religious beliefs.

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the *religious liberty* protected by the Free Exercise clause . . ." Stewart, J., concurring in *Sherbert, supra*, at 413 (emphasis supplied).

to proselyte or worship in public places." *McDaniel v. Paty*, 435 U.S. 618 (1978) at 640 (Brennan, J., concurring).

This Court has never held, as Petitioners seek to persuade it to hold, that constitutional provisions relating to separation of church and state require the prohibition of private religious activity where the factual context includes any contact with government. Indeed, the Court has long acknowledged that "no perfect or absolute separation" is really possible; and that the "very existence of the Religion Clauses is an involvement of sorts—one that seeks to work boundaries to avoid excessive entanglement." *Walz v. Tax Commission*, 397 U.S. 664 (1969) at 670.

The Court has also recognized an affirmative duty to accommodate free exercise when such activity does not interfere with the rights of others.

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. *Zorach v. Clauson*, 343 U.S. 306 (1952) at 313-314.

There is, of course, no conflict between the decision of the Eighth Circuit in this case and the Supreme Court prayer and Bible reading cases.[7] Those cases all involved

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7. *Abington Township School District v. Schempp*, 374 U.S. 203 (1962); *Engel v. Vitale* 370 U.S. 421 (1962); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction during school hours on school property), involved sponsorship and entanglement, although the coercion factor was less than in *Schempp* or *Engel*.

elements of religious *sponsorship* or of *coercion* by the *state*, which violated the rights of those of a different religious viewpoint. Nor is there any conflict with the recent "Ten Commandments" decision of this Court[8] because that case involved *official state action*, not simply the neutral accommodation of the actions of private individuals. Nor is there any conflict with the decisions of this Court relating to public financial assistance to religious institutions and activities,[9] because the "financial assistance" element here is the same as in the public park cases.[10]

The fact that the decisions of this Court clearly reflect a recognition of the necessity for government accomodation of free speech and free exercise, the fact that this Court has previously refused to grant certiorari to review these issues,[11] and the fact that this Court has shown such a strong commitment to freedom of expression and to the open marketplace of ideas in our universities,[12] all indicate that this case is in harmony with the previous decisions of this Court.

## II. The Decision in This Case Is Not in Conflict With the Decisions of Any Other Circuit.

No Circuit Court of Appeals has rendered any decision in conflict with the decision in this case. The federal dis-

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8. *Stone v. Graham*, Case No. 80-321, decided Nov. 17, 1980.

9. *E.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Committee for Public Education v. Regan*, ..... U.S. ....., 63 L.Ed.2d 94 (1980).

10. *E.g., Fowler v. Rhode Island, supra; Niemotko v. Maryland, supra.*

11. *Keegan v. University of Delaware*, 349 A.2d 14 (1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976).

12. *Healy v. James*, 408 U.S. 169 (1972).

trict courts in other circuits have ruled on similar issues involving religious speech and exercise by university students.[13] In addition, other high level appellate courts have also ruled on the same or on similar issues involving use of university faciliities for religious meetings.[14] And another United States Court of Appeals, in deciding whether the National Park Service should be enjoined from allowing the Pope to conduct services on the national mall, dealt with many of the issues in this case. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979).

The only court decision anywhere which holds that discriminatory restrictions can be placed on the use of university facilities by student religious groups is *Dittman v. Western Washington University*, ..... F. Supp. ....., Cause No. 79-1189V (W.D. Wash., 1980) (appeal docketed, 9th Cir., No. 70-3120, Apr. 7, 1980). In that case, Western Washington University regulations permitted limited use of university facilities by religious groups, upon the payment of a rental charge, while other student groups were permitted unrestricted use of facilities without charge. The decision of the U.S. District Court in that case was rendered shortly after the District Court decision in this case.[15]

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13. *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969) (a three-judge court struck down a university regulation prohibiting students from hosting religious speakers on campus) *Id.* at 975-76. *Dittman v. Western Washington University*, ..... F. Supp. ....., Cause No. 79-1189V (W. D. Wash. 1980) (appeal docketed, No. 80-3120, 9th Cir. Apr. 7, 1980) (the university could refuse to give equal accommodation to religious activities, but could not *totally* deny accommodation). This case is discussed *infra*.

14. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), reh. denied, 425 U.S. 945 (1976), discussed *supra*. *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (En Banc 1974) (upheld the rental for seven consecutive days of the Arizona State University stadium by the Billy Graham organization).

15. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo., 1979), was decided December 11, 1979. The *Dittman* case was decided February 27, 1980.

The *Dittman* Court was undeniably influenced by the District Court decision in *Chess*,[16] and found itself trying to reconcile Judge Collinson's opinion in *Chess* with the decision of the Supreme Court of Delaware in *Keegan, supra.* The result of that effort was the interesting ruling that a certain amount of discrimination against religious activity on campus is justifiable in the interest of separating church and state, as long as religious activity is not *totally* forbidden. The obvious problem with such a ruling is that it becomes very difficult to determine just *how much* discrimination against religious speech and exercise in a public forum can be permitted in the name of separating church from state. The theory is a dangerous one because it gives the state the right to restrict first amendment liberties in a public forum; and it gives the administrator, who exercises discretion as to the amount of accommodation to be allowed, no clear guidance or standards by which to allocate access to the facilities.

Since the District Court in *Dittman* was influenced heavily by Judge Collinson's District Court opinion in this case, which has now been solidly reversed, the Ninth Circuit should have no difficulty in reversing the District Court decision. If it fails to do so, then *that* case, and not this one, would be the appropriate case in which to grant a writ of certiorari. In any event, because of its reliance upon *Chess* at the District Court level, *and because of the likelihood of being reversed,* the *Dittman* case can be discounted as representing any conflict with the Eighth Circuit decision in this case.

## III. The Decision of the Court of Appeals Is Correct.

The Eighth Circuit opinion in this case capably deals with the issues, provides illumination as to the analysis

16. The *Chess* decision is mentioned three different times in the opinion in *Dittman.*

employed, and expressly rebuts the major arguments of the University. Student-Respondents do wish, nevertheless, to briefly discuss several key aspects of the decision.

### A. The Court Correctly Found That the Buildings and Grounds of the University Commonly Used for Voluntary Student Activities Constituted a Public Forum.

The University contends that a policy of allowing religious groups to meet on the campus would constitute an endorsement by the University of the purposes of the religious groups. The University thus fails to recognize that it has created a public forum, and that a nondiscriminatory policy of allowing equal access to the forum by all recognized groups does not constitute sponsorship or endorsement of the purpose or message of any group.[17] The University has "officially recognized *over ninety* active student organizations, each with its specific area of interest," (Appendix at A-3, footnote 1) and one of the benefits of official recognition is the right to use the facilities of the University (Appendix at A-27). The Eighth Circuit correctly found these facilities to be a public forum, a place where private association and expression can take place without censorship as to content of matters discussed. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gay Students' Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979); *Spartacus Youth League v. Board of Trustees*, ..... F. Supp. ....., Case No. 78-C-1224 (N.D. Ill., April 2, 1980). Hence, even if the State of Missouri could show a compelling state interest

17. The District of Columbia circuit noted that when the forum is available to all kinds of religionists and anti-religionists (including the Pope, the Reverend Moon, and Madalyn Murray O'Hair) there is no "establishment of religion" and "there cannot be a meaningful perception of one." *O'Hair v. Andrus*, 613 F.2d 931 (1979) at 934.

in banning religious speech and activity from public property, that showing would be entirely *immaterial* where we are talking about a public forum.[18] Any other approach would threaten to "thwart first amendment values underlying communication and religious freedom." *O'Hair v. Andrus, supra,* at 937.

### B. The Court Correctly Ruled That Missouri's "Compelling State Interest" in Strict Separation of Church and State Did Not Justify the Burdens Placed on the Students' Rights of Free Speech, Free Exercise of Religion, and Equal Access to a Public Forum.

The University contends that the State of Missouri is very concerned about keeping religious teaching and worship off of its University campuses. How do we know that this is true? Has the state legislature issued a resolution on the subject? What about the state's interest in *freedom of speech* and *freedom of religion?* The University, which has the burden of establishing such compelling state interest, was unable to convince the Eighth Circuit that the State of Missouri really had a compelling interest in keeping religion off campus (Appendix at A-12, footnote 7). The University cites the constitutional provisions prohibiting a transfer of funds from the State Treasury for religious purposes. But since this case does not involve a transfer of funds, the University asks the Court to use its imagination in deciding that the State of Missouri opposes tolerating religion on campus.

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18. The D. C. Circuit rejected arguments based on the establishment clause in *O'Hair v. Andrus, supra,* because the national mall was a public forum. The Supreme Court of Delaware rejected arguments based on the Establishment Clause and provisions of the University Charter in *Keegan, supra,* partly because the commons area of the dormitory was a place in which "the University permits every other student activity." 349 A.2d 14, at 17-18.

But even if we were to assume as true that the State were very, very concerned about keeping religion off campus, for whatever reason, any provision of state law requiring the restrictions set forth in the regulation in this case would have to be struck down in the face of the first amendment. No state is entitled to legislate away fundamental first amendment freedoms simply by asserting a "compelling state interest."[19] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbet v. Verner*, 374 U.S. 398 (1963); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1978), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978).

### C. The Court Correctly Held That the University Regulation in Question Violated the Establishment Clause As Well As the Free Exercise Clause.

The Eighth Circuit very astutely found that, where a public forum exists, any attempt to censor out religious speech on the basis of content is not only *not required* by the Establishment Clause, but also actually *violates* the Establishment Clause because it has a *primary effect* of inhibiting religion (Appendix at A-14).

The Supreme Court for a number of years has recognized that a state regulation which is hostile to traditional forms of religious exercise (*e.g.*, prayer, Bible reading) may violate the Establishment Clause as well as the Free Exercise Clause where the primary effect of the regulation is to inhibit traditional forms of religious exercise while advancing secularism and other movements which oppose

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19. The extreme viewpoint that state interest in separating church and state overrides state interest in accommodating the free exercise of religion could lead to the absurd conclusion that the state can deny voluntary religious observance in state penitentiaries and state hospitals.

or replace traditional forms of religion.[20] The Eighth Circuit has now also recognized that the government has no business advancing the cause of secularism any more than the cause of any traditional religion. The government must remain scrupulously neutral as to these matters of conscience and individual belief. The best way for the government to remain neutral is to allow all forms of such expression. *O'Hair v. Andrus, supra.*

In addition to the requirement of government neutrality with regard to religious matters, it is essential that the effect of the regulation is not to excessively entangle the state in religion. Our society today contains many religious and quasi-religious movements which are not immediately identified as "religions" by administrators because these movements do not have the labels we traditionally associate with religion. Examples of such movements are eastern mysticism, transcendental meditation, yoga, witchcraft, humanism, and secularism.[21] An administrator is likely to screen out and prohibit a Roman Catholic mass or a Baptist Student Union prayer meeting, while permitting a meeting with regard to transcendental meditation or humanism.[22] With new and different religions

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20. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Mr. Justice Black noted that religions "based on a belief in the existence of God" are not entitled to more protection than religions "founded on different beliefs." *Id.*, at 495. Likewise, they are not entitled to less. That is the reason for the inclusion in the *Lemon - Walz* three prong test that no state regulation can have a primary effect inhibiting religion. See also *Abington School District v. Schempp*, 374 U.S. 203 (1961) at 299, where the Court discussed the fact that the state cannot be hostile to religion; and a similar discussion in *Epperson v. Arkansas*, 393 U.S. 97 (1968) at 103-104, about the requirement of neutrality between religion and non-religion.

21. *Torcaso v. Watkins*, 367 U.S. 488 (1961), footnote 11, at 495; *O'Hair v. Andrus, supra*, footnote 19, at 935.

22. It is unclear what action, if any, UMKC would have taken prior to the invalidation of the regulation if a group of students had invited Madalyn Murray O'Hair to speak on campus

(Continued on following page)

and movements appearing regularly in American culture today, a very formidable task of censorship is forced upon the university administrator, entangling the university in extremely difficult religious definition and distinction. The Eighth Circuit Decision in this case wisely avoids establishment problems created by such entanglement, and further avoids the establishment problems created by favoritism and lack of neutrality.

### D. The Fact That the Students Applied for the Right to Use Space on a Regular Basis Is Immaterial.

The University attempts to make much of the fact that the students in this case desire regular, rather than just occasional, use of the facilities. Of course, the Eighth Circuit summarily dismissed this argument since the regulation in question did not permit *any* meetings, even where requested on an occasional basis (Appendix at A-17).

The University relies upon cases where the right to use public facilities for religious purposes was upheld, but in which, in dicta, the courts expressed concern about the possible "establishment" effect of permitting regular meetings.[23]

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Footnote continued—
for the purpose of teaching her "gospel." Under the ruling of the Eighth Circuit in this case, it is clear she could not be forbidden to speak, and the same would apply to Billy Graham. The University does not need to concern itself with such distinctions.

In the March, 1978, issue of *Educational Leadership*, James K. Uphoff argues that Ethical Culture, secularism, humanism, and scientism have all become religions in the broad sense.

See also Whitehead and Conlan, *The Establishment of Secular Humanism as a Violation of the Establishment Clause*, 10 Texas Tech. L. Rev. 1 (1978).

23. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir., 1979), at 939 (MacKinnon, J., concurring); *Pratt v. Arizona Board of Regents*, 110 Ariz. 466, 520 P.2d 514 (En Banc 1974), at 517.

What the courts have really been concerned about in these cases, however, is not the distinction between regular and irregular meetings, but rather the distinction between equal availability and pre-emption. If a facility can accommodate all groups desiring to use it, religious or non-religious, and if all such groups are permitted, on an equal basis, without favoritism, to schedule regular meetings, there is no pre-emption of facilities by any group. Student-Respondents concede that if a relatively small amount of available space were pre-empted by a religious group to the exclusion of other groups, there could be an "establishment" of religion. That is not the case here. The forum is now open. The forum is available on a like basis to all, and the record fails to indicate any lack of ability to accommodate all groups, whether or not desiring regular meetings. There can, therefore, be no establishment.[24]

## CONCLUSION

This Court has never chosen to review a case presenting the exact issues of this case. There is no reason to do so now. As a result of the Eighth Circuit opinion in this matter, it is now settled that a public university may not discriminatorily refuse access to facilities on the ground that the proposed use includes "religious teaching" or "religious worship." This is a healthy development, and it is one which will improve the educational and cultural climate of the University. Students attending the University have the right to expect that religious ideas will compete for their attention and allegiance along with all other ideas. The first amendment includes the right to hear as well as the right to speak. *Brooks v. Auburn Uni-*

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24. See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

*versity*, 412 F.2d 1171, 1173 (5th Cir. 1969); *James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill., 1972). Restriction and suppression of student-initiated religious teaching and religious worship would, in the end, tend only to impoverish the opportunities for inquiry and development which are now offered the students.

For all of the above reasons, Student-Respondents respectfully request that the Petition for Certiorari be denied, and further request that counsel for Student-Respondents, who have expended approximately 26 hours preparing the response to the Petition for Certiorari, be compensated by an award of attorney's fees pursuant to 42 U.S.C. Section 1988 at the rate of $70.00 per hour, or in an amount to be set by the Court.

Respectfully submitted,

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